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IN THE SUPREME COURT OF THE STATE OF UTAH

Karen R. Hofmann, :
Plaintiff-Appellant, :
-vs- : No. 16265
Elizabeth S. Sullivan, :
Defendant-Respondent. :

APPELLANT'S BRIEF

Appeal From the Order of the Third Judicial
District Court for Salt Lake County

Honorable Christine M. Durham, Judge

James R. Soper, of
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TABLE OF CONTENTS

STATEMENT OF THE CASE	1
DISPOSITION IN THE LOWER COURT	1
RELIEF SOUGHT ON APPEAL	1
STATEMENT OF FACTS.	3
ARGUMENT.	5
POINT I. AS A MATTER OF LAW, RESPONDENT HAS BREACHED THE WRITTEN AGREEMENT BETWEEN THE PARTIES AND APPELLANT IS ENTITLED TO A JUDGMENT FOR THE RESULTING DAMAGES	5
POINT II. THE AGREEMENT OF PARTIES PROVIDES THAT APPELLANT IS ENTITLED TO PURCHASE THE PROPERTY FOR THE SUM OF \$48,300.00	8
POINT III. APPELLANT IS ENTITLED TO DAMAGES IN THE SUM OF \$9,450.00, OR IN THE ALTERNATIVE A NEW TRIAL TO DETERMINE DAMAGES	11
CONCLUSION.	13

Authorities Cited

Bonneville v. Sloane, 572 P.2d 402, 403 (Utah 1977)	.10
Cummings v. Nielsen, 42 Utah 157, 129 P. 619 (1912)	.6, 7, 13
Russell v. Park City, Utah Corp., 548 P.2d 889 (Utah 1976).6

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Honorable Christine M. Durham, Judge

STATEMENT OF THE CASE

This is an action for damages arising from the breach of
an agreement to convey real property.

DISPOSITION IN LOWER COURT

The Plaintiff and Defendant both moved for summary judgment in this matter. The lower court denied Plaintiff's motion for summary judgment and granted Defendant's motion for summary judgment.

RELIEF SOUGHT ON APPEAL

Plaintiff requests that this Court reverse the summary judgment granted in favor of Defendant and enter a judgment

in favor of Plaintiff in the sum of \$9,450.00, or in the alternative that the case be remanded to the trial court for the purpose of awarding damages to Plaintiff for breach of the agreement.

STATEMENT OF FACTS

A different aspect of this case involving many of the same facts was before this Court recently in Case No. 15742 involving the same parties. The case was argued before the Court on February 21, 1979. The prior and present appeal both center around the same lease agreement and in particular, paragraphs 13. and 14. of that agreement which are as follows:

"13. Upon expiration of this lease, the Lessee shall have first right of refusal in signing of a lease for this premises, and first right of refusal in acceptance of the sale of said premises.

14. Upon expiration of this lease (or before if mutually agreed upon) the Lessee shall be able to apply one hundred dollars (\$100.00) per month of the above agreed rental upon the sale price of the premises, set at this date as Forty nine thousand five hundred dollars (\$49,500.00). If the Lessee does not wish to exercise this option, the full amount of monthly rental shall be reverted to rental only and considered as obligation to carrying out terms of the lease."

In the prior appeal, Appellant claimed that paragraph 14. gave her an absolute option to buy the premises at the expiration of the lease for the price stated. The Third Judicial District Court for Salt Lake County, Honorable Bryant H. Croft presiding, denied Plaintiff's claim stating that paragraphs 13. and 14. must be read together and that the effect of the two paragraphs so combined was to give Appellant only a conditional option to purchase the premises if and when Respondent decided to sell. Appellant's prior appeal was therefore based in part on Judge Croft's interpre-

tation of the document as stated, Appellant's position being that paragraphs 13. and 14. were separate and distinct.

Appellant's second action resulting in the present appeal was brought for the reason that Respondent did in fact decide to sell the premises and did in fact sell the premises to a third party without first offering the premises to Appellant and without notifying the Appellant of the sale. The sale of the property to the third party was finalized on January 13, 1978, ten days before judgment in the prior action was entered. The sale price to the third party was \$57,750.00, cash. (Defendant's Answers to Plaintiff's First Set of Interrogatories, No.'s 2., 3., and 6.)

Appellant commenced the instant action after learning of the sale of the premises to a third party. Appellant and Respondent both moved for summary judgment in the lower court. Appellant moving for summary judgment in the amount of \$9,450.00 or in the alternative for a summary judgment in Appellant's favor on the issue of liability only. Respondent brought her motion for summary judgment on the theory that Appellant's right to purchase the premises expired at the expiration of the lease, October 14, 1977. On December 28, 1978 the lower court filed a memorandum decision and the order denying Appellant's motion for summary judgment and granting Defendant's motion for summary judgment was entered on January 9, 1979.

ARGUMENT

POINT I

AS A MATTER OF LAW, RESPONDENT HAS BREACHED THE WRITTEN AGREEMENT BETWEEN THE PARTIES AND APPELLANT IS ENTITLED TO A JUDGMENT FOR THE RESULTING DAMAGES.

The written agreement is attached to Plaintiff's Complaint and is also attached to Defendant's Affidavit Supporting Motion for Summary Judgment. The agreement provides for the lease to Appellant of a certain dwelling owned by Respondent. Pursuant to the lease provisions, Appellant entered into possession for the one year term ending on the 14th day of October, 1977. Appellant paid to Respondent the monthly rent provided in the agreement. (Affidavit of Hofmann, No. 3)

The agreement provided in part the following:

"13. Upon expiration of this lease, the Lessee shall have first right of refusal in signing of a lease for this premises, and first right of refusal in acceptance of the sale of said premises.

14. Upon expiration of this lease (or before if mutually agreed upon) the Lessee shall be able to apply one hundred dollars (\$100.00) per month of the above agreed rental upon the sale price of the premises, set at this date as Forty nine thousand five hundred dollars (\$49,500.00). If the Lessee does not wish to exercise this option, the full amount of monthly rental shall be reverted to rental only and considered as obligation to carrying out terms of the lease."

On January 13, 1978, Respondent sold the subject property to a person other than Appellant for the cash price of \$57,750.00, Appellant was given no notice of the intended sale nor was

Appellant offered an opportunity to be the purchaser at said sale. Appellant would have purchased the subject property had it been offered to her. (Affidavit of Hofmann, No. 5. and 6.)

Appellant's claim that Respondent breached the agreement is based on Paragraph 13. of the agreement which grants a right of first refusal in acceptance of the sale of the premises upon expiration of the lease. The nature of a right of first refusal was explained by the Utah Supreme Court in the case of Russell v. Park City, Utah Corp., 548 P.2d 889 (1976). Therein the Court stated at page 891:

"We note awareness that what is often called 'the right of refusal' is not the same as an option, wherein the optionee has a definite right to purchase, whereas, the right of refusal has no effect until and unless the party granting it . . . decides to sell."

A right of first refusal therefore continues until the event of sale. The grantor of the right controls the length of time during which the right of first refusal continues by his decision as to whether or not to sell. Since the right of the grantee to purchase arises only when the grantor decides to sell, no date of expiration for the right need be stated or determined as in the case of an option where the optionee is granted an absolute right to purchase during a certain time period.

In accord with the foregoing discussion is the case of Cummings v. Nielsen, 42 Utah 157, 129 P. 619 (1912). The agreement therein provided for the sale of certain shares of

stock and in addition provided:

" . . . and also to give an option on all their or either of their interest in the estate of Julian Moses, deceased, or refusal to purchase the same at a price as low as any other bona fide offer for it or any portion of it . . ."

The appellants in that case claimed that the agreement granted them the right to purchase the property when the respondents decided to sell. The appellants established at trial that the property had been sold approximately nine months after the above agreement was signed, and further established that the sale was made without the knowledge or consent of appellants. In response to the respondents' argument that the agreement was unfair because it contained no time limit, the Court made the following comments:

"Counsel contend that it appears from the face of the agreement that it is unfair because it contains no limit of time within which the option should be exercised. This objection has no merit, because no time limit was necessary under the terms of the agreement. The option was to become effective only in case the Nielsons desired to sell their interest in the land mentioned in the agreement. If they did not wish to sell, they were not bound to do so; but, if they did intend to sell, then under the agreement they bound themselves for a valuable consideration expressed therein to give the appellants the option, or, as it is expressed in the agreement, 'refusal to purchase', the interest mentioned . . ." Cummings at 165

In the instant case, the written agreement which was drafted by the Respondent provides that the Appellant's right of first refusal commences upon expiration of the lease, October 14, 1977. Respondent states in her affidavit dated

May 16, 1978, that she sold the subject property on January 13, 1978 to a person other than Appellant. Appellant was given no notice whatsoever of the intended sale as stated in Appellant's affidavit. Respondent has therefore breached the agreement and Appellant is entitled to a judgment for the resulting damages as a matter of law. The Court in Cummings stated at page 165:

"If the Nielsons desired to sell they were thus required to give Mr. and Mrs. Cummings an opportunity to purchase - that is, the refusal to purchase the interest in the lands. This is too plain for cavil, because by the term 'refusal to purchase' everybody knows what is meant, although the condition may not be fully expressed. What is meant thereby is that, if the owners of the interest in question desired to sell it, they must communicate that fact to the party holding the option to purchase, and thus give the latter an opportunity to purchase or to refuse to do so. If the latter refuses, he has fully exercised his option. If, however, he then expresses his willingness to purchase, the question of price arises."

The matter of price and damages is addressed in the next point of argument.

POINT II

THE AGREEMENT OF PARTIES PROVIDES
THAT APPELLANT IS ENTITLED TO
PURCHASE THE PROPERTY FOR THE
SUM OF \$48,300.00.

As mentioned in the Statement of Facts, the written agreement between the parties has been the subject of prior litigation and appeal to this Court. Paragraph 14. of the agreement refers to an option at the sale price of \$49,500.00. The same

paragraph provides that the Lessee (Appellant) shall be able to apply \$100.00 per month of the rental payments towards the sale price, resulting in the sale price of \$48,300.00.

In the prior action, Judge Croft found that paragraph 14. did not grant Appellant an absolute option to buy the property at the price stated. Judge Croft's reasoning was as follows:

"And you read paragraph 13 and paragraph 14 together, and I do not find that it is a clear, unequivocal option to the plaintiff to buy at the end of the lease period should she elect to do so. Rather, I think that the rather clear intent is that if the defendant decides to sell at the end of the lease period, or before if the parties agree, you see, then the plaintiff would have the first right of refusal. And if she exercised the right to buy upon the defendant deciding to sell then under paragraph 14 a hundred dollars a month of her monthly rentals would be applied to the purchase price." (Tr. motion for new trial, p. 14 ln. 20-29, presently part of record in Supreme Court No. 15742)

"If the plaintiff exercised her right to buy, exercised her first right of refusal by deciding to buy, then under paragraph 14, I don't think there is any question that she would be able to apply \$1,200.00 of the rental paid to the purchase price set out in that paragraph." (Tr. plaintiff's motion for new trial, p. 15, ln. 10-15, presently part of record Supreme Court No. 15742)

Judge Croft's position is that because paragraph 13. which grants a right of first refusal precedes paragraph 14. granting the option at a fixed price, the combined effect is to give Appellant the right to purchase upon the stated price in

paragraph 14. only in the event Respondent decides to sell. Since the Respondent did subsequently did decide to sell, Appellant should therefore have been allowed to purchase at the price of \$48,300.00. If this were not the case, paragraph 14. would have no application whatsoever in the agreement. If Appellant cannot demand to purchase the property at the stated price upon the expiration of the lease as she attempted to do with the assistance of the courts in the prior action, and if Appellant is not allowed to have the benefit of the stated price now that Respondent has decided to sell the property, then Appellant's rights under the agreement are merely a fiction.

It should be noted that Appellant's status in the negotiation of this agreement was that of tenant and Respondent's status was that of landlord. It was established without dispute in the prior action and in this action by way of Appellant's affidavit that Respondent was entirely responsible for the drafting and preparation of this agreement and that the Appellant as a tenant was merely presented with the agreement for signature. As this Court has observed in Bonneville on the Hill Co. v. Howard N. Sloane, 572 P.2d 402, 403 (Utah 1977):

"In view of the dispute which has arisen, the meaning of that covenant quoted above should be determined from the language of the lease, and the circumstances in which it was used, as manifesting the intent of the parties. In that connection, a foundational rule is that if there is any doubt or uncertainty in the language, it should be strictly construed against the plaintiff landlord, who furnished the lease and required the tenant to sign."

There is no equity in the proposition that a landlord can draft a lease and therein dangle the opportunity to purchase the leased premises at a stated price before the eyes of the tenant and then after receiving the consideration of rental payments during the lease period, snatch away the tenant's benefit of the bargain which only matures when the lease period expires.

POINT III

APPELLANT IS ENTITLED TO DAMAGES IN THE
SUM OF \$9,450.00, OR IN THE ALTERNATIVE
A NEW TRIAL TO DETERMINE DAMAGES.

It is the well settled rule in Utah that the measure of damages for failure to convey real property is the difference between the market value of the property at the time of breach and the purchase price agreed upon. In accordance with the foregoing discussion, Appellant should have been allowed to purchase the property for the agreed price of \$48,300.00. The Respondent states in her Answers to Interrogatories that the property was advertised in the newspaper and that the property was sold for the cash price of \$57,750.00. For the purposes of this appeal, Appellant does not dispute the sum of \$57,750.00 as the market value of the property. No other evidence of market value was offered in this action although the Respondent testified at the trial in the prior action that she recently obtained an appraisal for \$58,500.00. (Tr. p. 43, ln. 18-23) Assuming that the price at which the property was

actually sold is in fact market value, Appellant's damages are fixed at \$9,450.00. In the alternative, Appellant requests this Court remand this matter to the lower court for the purpose of awarding damages. This relief is consistent with Appellant's Motion for Summary Judgment in the lower court where it was moved in the alternative for summary judgment as to liability only with the matter of damages being reserved for trial.

CONCLUSION

The Court below committed reversible error by finding that Appellant's right to purchase the property was extinguished at that exact point in time when the lease expired. According to the express words of the agreement, Appellant's right came into existence only upon expiration of the lease and if that right expired at the same time it did not exist for any practical purpose. The correct view of a first refusal right was pronounced by this Court in the Cummings case where it was held that such a right continues until the grantors decision to sell at which time the grantor must first offer the sale to the holder of that right. If a right of refusal were held to exist only at the instant in time at which it were granted, the grantor would simply delay his decision to sell and escape any duty to the holder of the right who has paid a consideration therefore.

According to the view expressed by Judge Croft, at the time of Respondent's decision to sell, Appellant should have been offered the opportunity to purchase the property at \$48,300.00. Respondents sale to a third party for the sum of \$57,750.00 denied Appellant the benefit of her bargain in the amount of \$9,450.00 which Appellant is entitled to judgment therefore. In the alternative, Appellant requests that this case be remanded to the lower court for determination of damages.

Respectfully submitted,

ROBERTS, BLACK & DIBBLEE

151
By JAMES R. SOPER
Attorney for Plaintiff-Appellant

CERTIFICATE OF HAND DELIVERY

I certify that I caused to be delivered two copies of the foregoing APPELLANT'S BRIEF to Carol Brockbank Olson, Attorney for Defendant-Respondent, Twelfth Floor, Continental Bank Building, Salt Lake City, Utah 84101, this 19th day of April, 1979.

151